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HOUSE OF REPRESENTATIVES
AUSTIN

COMMITTEES:
ENERGY
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PUBLIC HEALTH,
CHAIRMAN

February 28, 1991

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Opinion Committee

Honorable Dan Morales
Attorney General
State of Texas
P. O. Box 12548
Austin, Texas 78711-2548

Re: Attorney General Opinion Request
Dallas Independent School District Purchasing Policy
Revisions to Implement a Tax Base Enhancement Policy

Dear Mr. Morales:

In May, 1990, the Dallas Independent School District Board (the "Board") established as a long-range priority, its intent to decrease the burden and expense on its taxpayers of operation of the Dallas Independent School District ("DISD") by seeking to expand, enhance, and stabilize the DISD's taxbase and ultimately, by lowering the DISD's tax rate. To accomplish this long-range objective, the Board determined it was necessary to protect, encourage, expand, and develop taxpayers within the geographic boundaries of the DISD. (See correspondence dated May 21, 1990, to DISD Assistant Superintendent for Management Services regarding tax base enhancement attached as Exhibit "A.")

On September 11, 1990, the Board approved a revision to its Purchasing Policy and Procedures to implement a Tax Base Enhancement Policy "...in conjunction with current Board policies and administrative regulations governing contracting and purchasing." A copy of the Tax Base Enhancement Policy (the "Policy") is attached hereto as Exhibit "B" and became effective September 12, 1990.

The Policy establishes a numerical scoring system which is incorporated into and made a part of the DISD's responsibility determination concerning vendors submitting bids to the DISD. Under the Policy, a vendor receives a certain number of points depending upon the bidder's residence, as well as the number and type of taxable improvements to real property located within the District which are owned or utilized by the vendor in its business. A contractor that is a local resident, with its principal place of business located within the geographic (and

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taxable) boundaries of the DISD, is afforded a clear preference in the Policy's scoring system.

In addition to residence, bidders are also scored on the basis of their participation in voluntary programs of the DISD involving the donation of funds, goods or services or economic value to the DISD. The Policy also attempts to evaluate a bidder's intended compliance with the DISD Minority and Women Business Enterprise Contracting and Purchasing Program (the "M/WBE Program") (copy of Program attached as Exhibit "C") by assigning points to a bidder based on the percentage of M/WBE participation the bidder claims it will achieve during performance of the contract. Currently, the DISD's M/WBE Program states that on District contracts of \$25,000.00 or more, bidders are required to meet the established M/WBE goal that M/WBEs participate in at least 25% of the total dollar value of the contract. Under the Policy, the greater the percentage of participation a bidder claims it will achieve, the more points the bidder receives under the scoring system.

Finally, the Policy states that for tax base enhancement purposes, the DISD will consider vendor/contractor proximity and/or residence, projected local employment opportunities, and projected local spending, in the award of all contracts for general construction, improvements, or public works projects. The Policy awards "tax base enhancement points" based upon expected taxes, local jobs created by the contract award, and the bidder's claimed total annual amount of local salaries and wages paid.

Procedurally, under the Policy the DISD will consider all bids that are within five percent (5%) or less of the lowest monetary bid submitted as "eligible for contract award." Then, under the guise of a "responsibility determination" the DISD claims the right to award a contract to a bidder who may not have submitted the lowest monetary bid, but instead claimed the highest number of points under the Policy's scoring system.

Recently, the DISD solicited bids for renovative construction work on the J.J. Rhoades Elementary School Project (the "Project"). The DISD required all bidders to submit a "Bid Evaluation Sheet" (sic) consisting of four pages (a copy of which is attached as Exhibit "D") with their bids. On November 20, 1990, the DISD received nine bids for the Project, with four bids being within 5% of the lowest monetary bid. The five low base bids on the Project were as follows:

Lowest base bid - \$999,990.00
Second lowest base bid - \$1,011,741.00
Third lowest base bid - \$1,019,999.00
Fourth lowest base bid - \$1,044,900.00
Fifth lowest base bid - \$1,045,900.00

As the above indicates, the fifth lowest bid was \$45,910.00 more than the lowest base bid, but within the 5% range established by the DISD's Policy. The contractor who submitted the lowest bid scored 66 points under the Policy while the contractor submitting the fifth lowest base bid scored 67 points. On December 11, 1990, the Board voted to award a contract for the Project to the bidder submitting the fifth lowest base bid at a substantially higher bid price, based upon the fact that the bidder scored a higher number of points (only 1 point more) than the low bidder.

Section 21.901(b) of the Texas Education Code requires all contracts proposed to be made by any Texas public school board for the construction, maintenance, repair or renovation of any building to be submitted to competitive bidding when the proposed contracts are valued at \$5,000.00 or more. Subchapter B of Chapter 271 of the Texas Local Government Code governs competitive bidding on certain public works contracts. Section 271.021(3) defines a common or independent school district as a governmental entity subject to the provisions of Subchapter B. Further, Section 271.024 of the Local Government Code states that if a governmental entity is required by statute to award a contract for the construction repair renovation of a structure...or other improvement or addition to real property on the basis of competitive bids, and if the contract requires the expenditure of more than \$10,000.00 from the funds of the entity, the bidding on the contract must be accomplished in the manner provided by Subchapter B.

The proposed contract for the renovation of the J.J. Rhoades Elementary School had a value of \$10,000.00 or more and thus, under the provisions of Section 21.901(b) of the Texas Education Code and Section 271.024 of the Local Government Code, said contract was required to be competitively bid in accordance with the procedures set forth in Subchapter B of Chapter 271 of the Local Government Code.

Section 271.027 of the Local Government Code reserves the right to governmental entities to reject any and all bids. However, Subsection (b) of Section 271.027 requires contracts to be awarded to the lowest responsible bidder. Subsection (b) further states that a contract may not be awarded to a bidder who

is not the lowest bidder unless before the award, each lower bidder is given notice of the proposed award and is given an opportunity to appear before the governing body of the governmental entity or the designated representative of the governing body and present evidence concerning the bidder's responsibility.

The Policy adopted by the DISD Board and as applied in the bidding of the J.J. Rhoades Elementary School Project raises the following questions which we submit for your consideration and response.

1. May a governmental entity subject to the competitive bidding requirements of Subchapter B of Chapter 271 of the Local Government Code, such as the DISD Board, award a contract for the construction of a public work requiring the expenditure of more than \$10,000.00 to someone not the lowest responsible bidder, based upon a general preference created by the DISD Board for bidders located within its geographic boundaries?
2. May a governmental entity such as the DISD Board award a contract for the construction of a public work requiring the expenditure of more than \$10,000.00 to someone not the lowest responsible bidder based upon a general preference created by the DISD Board for bidders who participate in voluntary donation programs of the School District?
3. May a governmental entity such as the DISD award a contract for the construction of a public work requiring the expenditure of more than \$10,000.00 to someone not the lowest responsible bidder based upon "tax base enhancement" considerations of vendor/contractor proximity and/or residence, projected local employment opportunities, and projected local spending?
4. Is the DISD M/WBE Program unconstitutional under the Equal Protection clause of the Fourteenth Amendment to the United States Constitution based upon the standards set forth by the United States Supreme Court in the recent case of City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989)?

5. Even assuming a governmental entity such as the DISD has an M/WBE Program which satisfies current constitutional standards, may the governmental entity award a contract for the construction of a public work requiring the expenditure of more than \$10,000.00 to one not the lowest responsible bidder based upon a general preference created for bidders offering greater minority participation or greater participation in the governmental entity's M/WBE Program in connection with the project being bid?
6. If the answer to any of the questions above is in the negative, is the contract awarded by the DISD on the J.J. Rhoades Elementary School Project void under the provisions of Section 271.028 of the Texas Local Government Code for failure to comply with the competitive bidding requirements contained in Subchapter B of Chapter 271 of the Texas Local Government Code?

Our research indicates that the apparent meaning and intent of Section 271.027(b) of the Local Government Code is that a governmental entity intending to award a contract must accept the bid or offer of the lowest responsible bidder. Stated otherwise, the contractor who submits the lowest bid may not receive the contract award unless deemed to be responsible by the governing body of the governmental entity. The statutory procedure contemplated by Section 271.027 entails a governmental entity, such as the DISD, going through a process of elimination, starting with the bidder submitting the lowest monetary bid responsive to the bid specifications and making a determination as to whether such bidder is responsible, i.e. whether the bidder can perform responsibly the requirements of the contract. See Attorney General Opinion JM-881 (1988). If the lowest bidder is deemed not to be responsible, then the governmental entity would go to the second lowest bidder and determine whether or not such bidder is responsible and repeat this process until the lowest responsible bidder is identified.

The procedural framework established by Section 271.027 of the Local Government Code is significantly different from the process created by the DISD's Tax Base Enhancement Policy. Under the Policy, all bidders submitting bids within 5% of the lowest monetary bid are eligible for consideration for award. All "eligible bidders" are scored under the evaluation scheme created by the Policy and apparently, the bidder receiving the highest score is deemed to be the "lowest responsible bidder." This

appears to be a contradiction however, since the object of the scoring system created by the DISD's Policy appears to attempt to identify the "most responsible" bidder or, perhaps more accurately, to identify the bidder who has the greatest ability to contribute to the tax base enhancement needs of the DISD, irrespective of whether a lower bidder can responsibly perform the requirements of the contract.

The stated purpose of the purchasing policy revisions adopted by the DISD Board on September 11, 1990, is to protect and encourage the development of businesses within the DISD boundaries. To that end, the Policy revisions have created a weighted preference towards local bidders who are within 5% of the lowest monetary bid. The Policy adopted by the DISD should not be validated by the DISD's attempt to characterize the preferences given to local bidders as issues of bidder responsibility.

In 1977, the Attorney General of the State of Texas was asked whether a county may award a contract to one not a low bidder on the sole basis that said bidder is a local merchant or businessman and the low bidder is not a local merchant or businessman. In Opinion No. H-1086 (1977), the Attorney General, relying upon guidance provided by the Texas Supreme Court in Texas Highway Commission v. Texas Association of Steel Importers, Inc., 372 S.W.2d 525 (Tex. 1963), stated, "the Texas Supreme Court has held that a limitation regarding the source of materials would be an illegal restriction upon competition; in our view the same would be true of a requirement that a bidder be located within the county." The Attorney General went on to state that a county may not, as a general matter, award a contract to one not a low bidder on the sole basis that said bidder is a local merchant or businessman and the low bidder is not a local merchant or businessman.

In the same 1977 Opinion, the Attorney General stated in dicta, "...there may exist circumstances in which the proximity of the bidders relates to the determination of the 'lowest responsible bidder,' which determination is within the reasonable discretion of the contracting authority." Evidently, the DISD has relied upon such language, as well as the general proposition that school districts are afforded almost unfettered discretion in making procurement decisions, as the bases for adopting and implementing the Policy. The DISD appears to have stretched the concept of determining a bidder's responsibility beyond all reasonable limits in attempting to characterize the preferences created in the Policy as issues of bidder proximity which relate contractor responsibility.

Although Section 271.027 of the Local Government Code does specifically state what considerations are appropriate when making a responsibility determination concerning a bidder, general guidance is available which clearly illustrates that the ability of a bidder to generate tax revenue, to enhance the tax base of a school district, or to increase the percentage of minority participation on projects are not proper factors to be considered in a responsibility determination. The Texas Legislature had the occasion to outline what factors are appropriate for responsibility determinations. The State Purchasing Act, Article 601b of the Texas Revised Civil Statutes, governs the competitive bidding requirements for state agencies and sets forth an example of the type of criteria to be applied in determining a responsible bidder. Section 3.11(e) of that statute requires attention to the following considerations:

1. The quality, availability, and adaptability of the supplies, materials, equipment, or contractual services to the particular use required;
2. The number and scope of conditions attached to the bid;
3. The ability, capacity, and skill of the bidder to perform the contract or provide the services required;
4. Whether the bidder can perform the contract or provide the service promptly, or within the time required, without delay or interference;
5. The character, responsibility, integrity, reputation, and experience of the bidder;
6. The quality of performance of previous contracts or services;
7. The previous and existing compliance by the bidder with laws relating to the contract or service;
8. Any previous or existing non-compliance by the bidder with specification requirements relating to the time of submission of specified data such as samples, models, drawings, certificates, or other information;

9. The sufficiency of the financial resources and ability of the bidder to perform the contract or provide the service;
10. The ability of the bidder to provide future maintenance, repair, parts, and service for the use of the subject of the contract.

In recent Attorney General Opinion, AG Opinion No. JM-881 (1988), in considering whether a county could require in construction contract bid specifications that a minimum of 25% of the work be performed by the contractor's employees, the Attorney General reiterated the well-established rule that an administrative body, subject to a competitive bidding statute, must act only to promote the unmistakable legislative policy favoring unrestricted competition for public contracts. The Attorney General held that a county thus has no power to limit the competition generated by bidding.^{1/} Nor may a governmental entity reject a bid by imposing a condition for the selection of the lowest responsible bidder when the condition could not be used to limit the solicitation of the bid.

The Attorney General has acknowledged that a county may make an informed, nonarbitrary decision based on the facts that a particular bid is not a responsible one. (Citing Corbin v. Collin County Commissioners Court, 651 S.W.2d 55 (Tex. App. - Dallas 1983 no writ)). The Attorney General has stated that if the governing body has an objective reason, supportable by facts fairly known to them, that a particular bidder cannot reasonably perform because of some objective impediment, they may consider rejecting that bid, and the rejection would not be an abuse of discretion. AG Opinion No. JM-881 (1988).

In rejecting the low bidder on the J.J. Rhoades Elementary School Project in favor of the fifth lowest bidder, the DISD Board did not make an objective determination supportable by facts that the low bidder could not reasonably perform the construction work for the renovation of the elementary school due to some deficiency on the part of that low bidder. Rather, the Board decided that the fifth lowest bidder, because it appeared

^{1/} It should be noted that the Texas Legislature subsequently amended the Texas Local Government Code in 1989 by adding subsection (e) to Section 271.025 to specifically authorize a county with a population of 2.2 million or more (Harris County) to require that a minimum of 25% of the work be performed by the bidder.

to contribute more towards the tax base enhancement of the DISD under the scoring system of the Policy, was a more favorable contractor, and awarded the construction contract on that basis.

The scoring system set forth in the Tax Base Enhancement Policy appears to be an arbitrary decision-making process regarding contractor responsibility. The vast majority of the categories for which points are earned relate to a bidder's ability to enhance the tax base of the DISD and have nothing to do with whether or not the bidder can reasonably perform the work required under a contract. The DISD's Policy has created a preference for bidders located within the geographic boundaries of the DISD who are perceived to provide greater contributions to the economic and social goals of the DISD. The Policy has established certain criteria for use in the selection of the "lowest responsible bidder," when such criteria could not lawfully be incorporated in the specifications of the bid. This preferential treatment of a class of bidders is the very type of action that the Attorney General has expressly prohibited in the past. See Attorney General Opinions JM-881 (1988); H-1219 (1978); and H-1086 (1977).

The DISD is a governmental entity that has been created by the Texas Legislature and thus holds only the powers granted expressly or by necessary implication by the Texas Legislature. Just as the State Department of Highways and Public Transportation lacked authority to adopt a rule creating a preference for domestically manufactured construction materials because it was deemed to be an impermissible restriction on competitive bidding; similarly, the DISD appears to lack the requisite statutory authority to implement a policy which favors contractors who contribute or enhance the tax base of the DISD. The Supreme Court of Texas has unequivocally stated that an administrative body must act in accordance with the legislative decision favoring unrestricted competition. See Texas Highway Commission v. Texas Association of Steel Importers, Inc., *supra*, at 527.

An important feature and critical consideration of the Tax Base Enhancement Policy is the percentage of minority participation offered by a bidder in connection with performance of the contract. The DISD's M/WBE Program requires bidders to attain minority participation in at least 25% of the total dollar value of the contract or, upon failure to meet such mandatory goal, provide documentation of its "good faith effort" to meet such goal. Recently, the Supreme Court of the United States, in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), held that a Richmond ordinance requiring prime contractors on

construction contracts to subcontract at least 30% of the dollar value of the contract to MBEs was unconstitutional under the Equal Protection clause of the Fourteenth Amendment to the United States Constitution. The City of Richmond defined MBEs in a manner similar to DISD and, like the DISD M/WBE Program, the Richmond ordinance provided for a waiver of the mandatory goal if the prime contractor could demonstrate a lack of qualified available MBEs to participate in the contract despite the prime contractor's good faith efforts.

In striking down the Richmond ordinance, the Supreme Court applied a "strict scrutiny" standard of judicial review to determine whether the classification based on race or sex in the City ordinance was constitutional under the Equal Protection clause of the Fourteenth Amendment. Essentially, the Supreme Court determined that in order for a minority participation plan with established goals to be deemed constitutional, the governmental entity must show a compelling governmental interest exists based upon probative and detailed evidence of past discrimination in public construction contracts in the specific locale affected by the ordinance. Further, the Court held that any plan attempting to remedy past instances of discrimination must be "narrowly tailored" so that the plan closely links the participation goals with remedying the effects of identified past discrimination and that a lawful or less restrictive alternative is not available.

One of the factors the Court considered in determining that the Richmond plan was not narrowly tailored to the goal of remedying identifiable past discrimination was the fact that it defined citizens such as Aleuts or Eskimos as minority group members intended to benefit from the plan. The Court stressed that including such citizens in the Richmond plan showed that the plan went far beyond remedying past discrimination related to public construction contracts in Richmond, Virginia. It should be noted that the DISD M/WBE Program includes "Alaska Natives" and "Pacific Islanders" as minority individuals for purposes of the DISD's program. Further, there is no evidence to indicate that when the DISD Board adopted its M/WBE Program on April 28, 1988, that it was based upon detailed evidence of past discrimination in public construction contracts in the geographic area occupied by the DISD.

Based on the foregoing, it appears that the DISD M/WBE Program cannot satisfy the strict scrutiny standard established by the U.S. Supreme Court and is probably unconstitutional. If such is the case, then it would seem that the incorporation of an unconstitutional minority participation program into the compe-

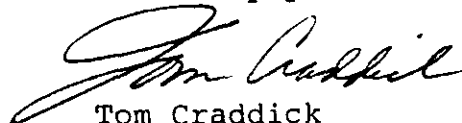
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titive bidding process of a local governmental entity subject to the requirements of Subchapter B of Chapter 271 of the Texas Local Government Code would be impermissible. Assuming the DISD's M/WBE Program does pass constitutional muster, it would appear inappropriate and an abuse of discretion by the DISD Board to consider the percentage of minority participation offered by a bidder as a factor in making a responsibility determination for purposes of contract award.

Based upon the authorities cited above, the DISD's Tax Base Enhancement Policy appears to impose impermissible restrictions on the competitive bidding requirements contained in the Texas Education Code and the Texas Local Government Code. Additionally, it appears that the DISD M/WBE Program is unconstitutional and, under any circumstances, should not be incorporated into the responsibility determination required for award of competitively bid public works contracts in Texas. In light of the foregoing, it seems likely that the contract awarded on December 11, 1990 by the DISD to the fifth lowest bidder for the J.J. Rhoades Elementary School Project was in violation of the competitive bidding requirements of Subchapter B of Chapter 271 of the Texas Local Government Code and therefore should be deemed void.

The issue of adequate funding for future public works projects will take on increased significance for all governmental entities in Texas. Certainly the issues of enhancing their tax base and assisting minorities in emerging as viable business concerns are important considerations and desirable objectives to be attained. However, the primary objective of the competitive bidding laws enacted by the Texas Legislature is to obtain the best work and products at the lowest practicable price. Measures such as the Tax Base Enhancement Policy of the DISD, which introduce political and economic considerations into the competitive bidding process, may serve to frustrate and impermissibly restrict competitive bidding on public works projects in Texas. For the above-stated reasons, your prompt consideration of the questions posed above is sincerely appreciated.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Tom Craddick".

Tom Craddick
State Representative

TC/dm